IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 26TH MARCH 2007 / 5TH CHAITHRA 1929

CRL.A.No. 1065 of 2002()

SC.80/1996 of ADDL.SESSIONS COURT, (ADHOC), FAST TRACK COURT-I, MANJERI.

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APPELLANTS: ACCUSED:

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1. KORALIYADAN ALIMAN ABU, S/O. ALI,
KOORANGALLIL, VETTILAPARA, MALAPPURAM DISTRICT.

2. JOHNY @ JOSEPH,
S/O. KAITHAKKATHADATHIL JOSEPH, VETTILAPARA,
MALAPPURAM DISTRICT.

3. REGHU, S/O. KUNHAN,
KAITHAKUNNU, VETTILAPARA, MALAPPURAM DISTRICT.

BY ADV. SRI.BABU S. NAIR
SMT.SMITHA BABU

RESPONDENTS: STATE:

THE STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE,
AREACODE POLICE STATION - THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKEN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1065 of 2002

Dated this the 26th March, 2007.

J U D G M E N T

Three accused in S.C.No.80/1996, on the file of the Additional District and Sessions Court, Manjeri, are the appellants. They were found guilty of the offence punishable under Section 333 I.P.C., read with section 34 I.P.C., and, therefore, were convicted and sentenced thereunder, to undergo rigorous imprisonment for three years and also to pay a fine of Rs.1,500/- each, in default of which, they were directed to undergo simple imprisonment for a further period of one year each. The same is under challenge through this appeal.

2. The prosecution case, in brief, is that on 12.1.1995, at the early morning hours, at about 4.00 A.M., PW.1, the Forester attached to Odakkayam range of reserve forests, along with PW.2 and others, the Forest Guards, were on patrol duty. They found the appellants carrying sized logs on their shoulders and approaching towards PW.1 and others. Seeing the forest officials, the first appellant threw the wooden log, carried by him on his shoulders, on PW.1, because of which the latter fell on the ground. Immediately,

PW.1, in that lying position, took out a torch light and lighted it. He identified the appellants. PW.1 was taken to the Government Hospital, Manjeri. He was treated there and the doctor, who treated him, had issued Ext.P5 wound certificate. PW.5, the Head Constable of Aruvikode Police Station, went to the Government Hospital, Manjeri, and recorded Ext.P1 First Information Statement of PW.1. Consequently, he registered Ext.P3 First Information Report under Section 333 I.P.C., read with Section 34 I.P.C., in crime No.13 of 1995 of that Police Station. PW.5 took over the investigation. Ext.P2 is the scene mahazar, prepared by PW.5, and attested by PW.4. Ext.P4 is the seizure mahazar, seizing MO.1 shirt, worn by PW.1. The records show that MO.2 series timber thrown away by the appellants were also seized, but no documents were produced. PW.6, the Sub Inspector of Police, completed the investigation, verified the records and filed the final report.

3. The prosecution examined six witnesses and marked five documents, along with two material objects, which had been identified. Exts.D1 to D4 were marked by the appellants.

4. After appreciating the evidence, the learned Additional Sessions Judge had convicted and sentenced them, as stated above.

5. The learned counsel for the appellants submitted, relying on Ext.D1 judgment in C.C.122 of 1997 of Judicial First Class Magistrate Court-II, Forest Offences, Manjeri, that there was absolutely no identification of these accused and, therefore, they were acquitted in the criminal case for the offence punishable under section 27(1)(e)(iii) and (iv) of the Kerala Forest Act. Counsel also relied on Ext.P5 wound certificate, as well as the evidence adduced by the prosecution through the prosecution witnesses. The further contention of the counsel is that had the names of the appellants been known to PW.1, he ought to have informed the same to the doctor, who issued Ext.P5, and also would not have stated in the way in which the doctor recorded in Ext.P5, which is contrary to Ext.P1 first information statement, recorded by PW.5. There is also delay in recording the first information statement and registering the first information report, Ext.P3. Counsel, therefore, contended that the case is falsely a foisted one and, hence, they may be acquitted.

6. The learned Public Prosecutor opposed the contentions of the counsel for the appellant.

7. I have gone through Ext.D1 judgment in C.C.122 of 1997. At paragraph 11, the court had discussed, at length, the preparation of Ext.P1 occurrence report in that case. The occurrence was on 12.1.1995. But the occurrence report reached the court only on 31.1.1997, ie., after two years. However, in the case at hand, Exct.P1 first information statement is seen received by the Magistrate on 16.1.1995. In it, the names of all the three appellants are mentioned. But, those names were not mentioned in Ext.P5 by PW.1.

8. I agree that the statement recorded by the doctor, treating an injured person, need not contain all the information. I also further agree with the argument of the prosecution that the injured may not even be in a state of mind to give the details of the assailants at the time when he gave the version of the occurrence to the doctor, who issued Ext.P5 wound certificate. But, the startling fact is that none of the prosecution witnesses, including PW.1, had deposed before

the court that they had prior acquaintance with the appellants and hence they had identified them. Similarly, they also did not identify the appellants even during the trial in court.

9. Counsel relied on **State of Maharashtra v. Sukhdev Singh** *(AIR 1992 SC, 2100)*, a death reference case, in which the identification of the accused was considered by the Apex Court. Relying on Kannan v. State of Kerala (AIR 1979 Supreme Court, 1127), quoted the findings of the Apex Court thus:

> "It is well settled that where a witness identifies an accused who is not known to him in the court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observations. The idea of holding T.I. parade under S.9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person, whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court."

10. There is no explanation available, why no test identification parade was held, particularly when PW.1 and others could not have prior familiarity with the appellants. There was only fleeting glimpses of one of the accused, the first appellant, who threw the log on PW.1 and escaped. There are different versions regarding the lighting of the torch, one, prior to the throwing of the log, and another version was that PW.1 fell down, on the log falling on him, and it was at that time that PW.1 took out the torch and lighted on the first appellant. The circumstances show that by the time the torch was lighted by PW.1, the appellants might have escaped, after leaving behind the logs, which they were carrying. In such circumstances, the only alternative was to conduct a test identification parade and clearly identify the accused, so that there will be the sanctity of law. The same is not done in this case. Similarly, as discussed above, none of them had been identified in the court. In such circumstances, I agree with the findings of the learned Magistrate, regarding the identity of the appellants. The same benefit is to be given in this case as well. Therefore, I hold that there was no identification of the appellants.

11. The version given in Ext.P5 that a few persons, who illegally carried the logs were intercepted and at that time they had assaulted PW.1 and others. Whereas in Ext.P1 it was recorded that at 8.30 P.M. on 12.1.1995, the log was put on his shoulder by the first appellant. In Ext.P5 the doctor recorded that PW.1 had sustained fracture of right collar bone and also contusion over right shoulder. The doctor had not been examined. Therefore, the oral evidence adduced by the prosecution, through the occurrence witnesses alone is available. When the version given by PW.1 himself varies, the same cannot be accepted regarding the mode of occurrence. Ext.P1 was recorded at 8.30 P.M. on 12.1.1995. Consequently, Ext.P3 first information report was registered. The same reached the court on 16.1.1995. No prosecution witness had deposed, how they came to know the appellants and the address of the appellants. The delay in Exts.P1 and P3 reaching the court is also not explained. Therefore, the same creates a doubt, the benefits of which is to be given to the appellants.

12. When I appreciate the evidence adduced by the prosecution, it is clear that the prosecution witnesses were unaware of the names and addresses of the appellants and Ext.P1 was not

recorded at 8.30 P.M. on the same day, but must have been on some other day, before 16.1.1995. In the absence of identification, the prosecution version cannot be accepted as deposed by them. The Magistrate court, which also had an occasion to see both the prosecution witnesses and the accused in action, had doubted the whole case of the prosecution. This court, dealing with this appeal, cannot accept the findings of the Additional Sessions Court, convicting and sentencing the appellants. When the whole evidence is thus re-appreciated, I hold that the prosecution has failed to prove the clear identity of the accused and also the overt acts attributed on the appellants. Therefore, I give the benefit of doubt to the appellants.

In the result, this appeal is allowed. The conviction and sentence passed by the trial court is set aside. The appellants, accused, are set at liberty forthwith, cancelling their bail bonds.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Criminal Appeal No.1065 of 2002

J U D G M E N T

Dated: 26th March, 2007.